

# HOUSE BILL REPORT

## HB 2747

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**As Reported By House Committee On:**  
Government Operations

**Title:** An act relating to regulatory reform.

**Brief Description:** Implementing regulatory reform.

**Sponsors:** Representatives Mastin, Reams, Silver and Johnson.

**Brief History:**

**Committee Activity:**

Government Operations: 1/23/96 [DPS].

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### HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Reams, Chairman; Cairnes, Vice Chairman; Goldsmith, Vice Chairman; Hargrove; Honeyford; Hymes; Mulliken and D. Schmidt.

**Minority Report:** Do not pass. Signed by 5 members: Representatives Rust, Ranking Minority Member; Scott, Assistant Ranking Minority Member; Conway; R. Fisher and Wolfe.

**Staff:** Charlie Murphy (786-7135).

**Background:** During the 1994 and 1995 sessions, the Legislature passed legislation that made substantial changes to the state agency rule-making process and the legislative review of rules. The changes included a Regulatory Fairness Act and state agency technical assistance. The Governor vetoed a number of sections contained in this legislation.

**Rule Adoption:** ESHB 1010 as passed by the Legislature during the 1995 session prohibited the departments of Labor and Industries, Revenue, Ecology, Social and Health Services, Health, Licensing, Employment Security, and Agriculture, the Fish and Wildlife Commission, the Forest Practices Board, the Commissioner of Public Lands, and the Insurance Commissioner from relying solely upon the agency's enabling provisions and/or statement of intent as statutory authority to adopt a rule.

All other agencies were prohibited from adopting rules based solely on enabling provisions and/or statements of intent when implementing future statutes, except to interpret ambiguities in a statute. The Governor vetoed the sections pertaining to the Forest Practices Board, the Department of Labor and Industries, and the Insurance Commissioner.

When adopting significant legislative rules, the departments of Labor and Industries, Revenue, Ecology, Health, Employment Security, and Natural Resources, and the Forest Practices Board must make certain determinations and place sufficient documentation into the rule-making file. These determinations include whether the probable benefits exceed the probable costs, whether the rule conflicts with federal or state law, and other determinations. A rule-implementation plan must be filed before adopting a significant legislative rule. The Joint Administrative Rules Review Committee (JARRC) may also require that a state agency rule be subject to these determinations. Certain rules, including emergency rules, procedural rules, rules adopting federal or state laws by reference, and other types of rules are exempt from this determination process.

An agency may adopt emergency rules if for good cause it finds that either (1) the immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that it would be contrary to the public interest to observe the time requirements for permanent rule adoption; or (2) state or federal law or a federal deadline for receipt of federal funds requires immediate adoption of a rule. The agency must include a statement of the reasons for the emergency in the rule adoption filed with the Code Reviser's Office. The emergency rule takes effect upon filing with the Code Reviser if no other date is specified. An emergency rule may not remain in effect for more than 120 days. A person may petition the Governor asking for immediate repeal of a rule adopted on an emergency basis.

Any person may petition an agency for adoption of an amendment or repeal of a rule. If an agency denies, the person may appeal to the Governor. The Governor has several alternatives, including directing certain agencies to commence rule-making or recommending to other certain agencies that they adopt, amend, or repeal the rule in question.

Challenges to Agency Actions: The burden of proof for demonstrating the validity of an agency action, including the validity of a rule, is on the person asserting its invalidity. Rule challenges must be commenced in court within two years of the rule's effective date.

A court is required to award fees and other expenses, including reasonable attorneys' fees, to a qualified party who prevails against a state agency in a challenge of an agency action unless the court finds that the agency action was substantially justified

or that circumstances would make an award unjust. The amount awarded may not exceed \$25,000. The court may reduce the award to the extent that a qualified party unduly or unreasonably protracted the final resolution of the matter. The law does not address the awarding of fees and other expenses if the agency appeals the Superior Court decision.

### **Summary of Substitute Bill:**

Rule Adoption: The Forest Practices Board, the Department of Labor and Industries, and the Insurance Commissioner are prohibited from relying solely on a statement of intent and/or the agency's enabling provisions as statutory authority for adopting a rule. The Insurance Commissioner may use enabling/intent provisions to adopt procedural or interpretive rules.

The prohibition against the Department of Labor and Industries relying on enabling/intent provisions as statutory authority for adopting a rule does not apply to rules pertaining to prevailing wage.

Exemption from the significant legislative rule determination process when adopting other state agency rules by reference is removed if the state agency rule to be adopted by reference has not been so processed. The agency must then comply with significant legislative rule procedures. When an existing significant legislative rule subsection is amended, the total section must be submitted to the determination process.

Rule Re-Adoption: Any person can petition an agency for re-adoption of an existing rule. Within 60 days the agency shall either deny, giving reasons and alternative means to address concerns, or commence rule re-adoption. After an agency denial, JARRC can be asked to direct the agency to initiate re-adoption. An automatic repealer occurs in six months when an agency fails to follow JARRC's re-adoption decision.

Judicial Review: The burden of proof is on state agency to show the validity of a challenged rule or to demonstrate that an agency order did not violate the challenged provisions of law.

The time period to challenge a rule in court is seven years after the rule's effective date.

After the year 2000, certain agencies cannot rely solely on a statute's intent or enabling provisions or a combination as authority for having adopted a rule challenged after the year 2000. The prevailing wage rules of the Department of Labor and Industries and the unfair practices rules of the Insurance Commission are exempted.

Attorneys' fees and expenses in rule validity cases for a qualified party are limited to the maximum amounts awardable: Superior Court, \$25,000; court of appeal and the Supreme Court, \$15,000. For other "agency action" cases, the maximum amount awardable in Superior Court is \$50,000; in courts of appeal and the Supreme Court, \$15,000. These awards do apply to cases pending on the effective date of the 1995 Regulatory Reform law (July 23, 1995).

The Insurance Commissioner's authority for making new rules about unfair methods of competition and unfair acts and practices is eliminated. The previously adopted rules on these subjects, are retained if otherwise valid, until repealed by the commissioner or through the enactment of new laws.

**Substitute Bill Compared to Original Bill:** SHB 2747 places the burden of proof on the agency to show that an agency order did not violate certain challenged provisions of law. It declares that certain designated state agencies after the year 2000 may not rely solely on statutes' intent and purpose or enabling provisions for authority to have adopted a rule if challenged in the year 2001 and after. The Department of Labor and Industries' prevailing wage rules and the Insurance Commissioner's rules under RCW 48.30.010 are excepted. However, the Insurance Commissioner's prospective authority for rules on this subject is eliminated. The provision dealing with the agency's duty to pay attorneys' fees on appeals even when the state prevails is eliminated.

**Appropriation:** None.

**Fiscal Note:** Requested on January 19, 1996.

**Effective Date of Substitute Bill:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** The bill contains improvements to limit state agency rule-making, to clarify significant legislative rule adoption requirements, and to improve judicial review features of regulatory reform.

**Testimony Against:** These provisions may be more costly. Some parties would like more time for SHB 1010 (1995 Session) to be applied before changes are made.

**Testified:** Representative Mastin, prime sponsor; and Bruce Wishart, Sierra Club.